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Strom v. Knox Broadcasting Corporation

Columbia Supreme Court (2014)

This appeal arises from a trial court decision upholding the non-compete provisions of an employment contract between George Strom and Knox Broadcasting Corporation. Strom left Knox Broadcasting Corporation to work for a competing broadcaster, WCAP-TV. WCAP-TV brought the action below to invalidate the non-compete provision and permit Strom to appear on air for WCAP-TV.

The trial court findings indicate that, from 2008 until 2013, George Strom was employed by Knox Broadcasting Corporation ("Knox") as a meteorologist and "television personality." That contract ended on September 1, 2013 and included the following contractual provision:

> Employee shall not, for a period of one hundred-eighty (180) days after the end of the Term of Employment, allow his/her voice or image to be broadcast 'on air' by any commercial television station whose broadcast transmission tower is located within a radius of thirty-five (35) miles from Company's offices in Columbia City, Columbia.

During Strom's employment with Knox, Knox spent in excess of a million dollars promoting Strom's name, voice, and image as an individual television personality and as part of Knox's Action News Team. Strom is one of the most recognized television personalities in the Columbia City area. Local television personalities are strongly identified in the minds of television viewers with the stations upon which they appear.

In April 2013, Strom entered into a five-year contractual agreement with WCAP–TV, a competitor of Knox, to work for WCAP as a meteorologist and "television personality" when his contract with Knox expired.

After learning of Strom's prospective departure, Knox instituted a "transition plan" to reduce the impact Strom's departure would have on the station's image. That plan depended on Strom not appearing on air for WCAP-TV for at least six months after leaving Knox. To permit Strom to appear on air for WCAP-TV during those six months would disrupt Knox's plans for a transition to a replacement for Strom.

Strom's contract with WCAP-TV does not require him to appear "on air" during the first six months of his employment. Under this contract, Strom would perform substantial duties and services to WCAP–TV for which he is being compensated. To permit Strom to appear on air, WCAP-TV would take advantage of the substantial investment Knox had put into developing Strom's public persona, in which Knox had a legitimate and protectable interest.

Finally, Strom will suffer no financial harm from staying off the air during the six months following his departure from Knox.

This case requires us to apply Columbia Stat. Ann. § 24-6-53(a), which states in relevant part:

> (a) Enforcement of contracts that restrict competition during the term of a restrictive covenant, so long as such restrictions are reasonable in time, geographic area, and scope of prohibited activities, shall be permitted.

The statute applies to contracts between employers and employees and thus applies to the contract between Strom and Knox.

Under the statute, we should uphold such a covenant only when strictly limited in time, territorial effect, and scope of the prohibited activities. In doing so, we must weigh the interest the employer seeks to protect against the impact the covenant will have on the employee.

The provision in this contract should be upheld. The time limit is appropriate, restraining Strom from appearing on air for six months, during which time he will

not appear on WCAP-TV in any case. It permits Strom to appear on air after a transition period tailored to allow Knox to develop an alternative broadcasting identity.

The geographical scope is appropriate, applying only to that broadcast area surrounding Columbia City. The provision restricts Strom's activity in the same media market as that in which his former employer operates.

The scope of the services covered is appropriate; the contract prohibits Strom from using an on-air personality in which Knox has a legitimate and protectable interest. Strom remains free to work for WCAP-TV as an off-air consultant.

Finally, enforcing the covenant in Strom's contract with Knox represents a fair balance of a distinct and substantial harm to Knox, when compared to a relatively minor and incidental harm to Strom.

We affirm.

Fawcett Railway Relief, Inc. v. Columbia Rail Services, Inc.

Columbia Court of Appeal (2015)

Fawcett Railway Relief, Inc. ("Fawcett") appeals from a declaratory judgment that voided a noncompetition covenant with Peter Markham ("Markham"), a former employee, and his new employer, Columbia Rail Services, Inc. ("CRS").

Fawcett is in the business of providing emergency disaster remediation services for railroads and industries with rail siding and rail yards in the lower 48 states, Canada, and Mexico. Markham began work for Fawcett in 2006 in Illinois, and over the course of seven years provided services in parts of Tennessee and Kentucky before locating in Columbia and performing services entirely within this state.

On December 2, 2011, after the move to Columbia, Markham entered into a renewed employment agreement with Fawcett that contained a non-compete provision. The non-compete provision prohibited Markham from working for three years in all of Florida, Columbia, Illinois, Ohio, Georgia, Kentucky, or Tennessee in any capacity.

On June 1, 2013, Markham left Fawcett and went to work for CRS, a direct competitor. Markham has worked for CRS only in Columbia. On April 7, 2014, CRS instituted this declaratory judgment action against Fawcett to have the covenant voided. The trial court agreed with CRS that the covenant involved was overly broad as to geographical scope, time period, and scope of services. It invalidated the covenant. Fawcett appealed.

The parties agree that Markham was an employee under this statute regulating covenants not to compete, Columbia Stat. Ann. § 24-6-53(a), and thus that the statute applied to this contract.

Fawcett contends that the trial court erred in invalidating the restrictive covenants as to their geographic scope, the scope of the services prohibited, and the time period of the restriction. For the reasons that follow, we disagree.

Geographic Scope

This geographic scope far exceeds the area within which Markham worked for Fawcett. This Court will accept as prima facie valid a restriction that covers the territory where the employee worked and the employer does business. However, a restriction that extends that territory to areas in which the employee did not work is overly broad on its face, absent a strong justification other than the desire not to compete with the former employee.

This restrictive covenant prohibited Markham from providing competing services in Florida, Columbia, Illinois, Ohio, Georgia, Kentucky, or Tennessee. The trial court's finding of fact noted that no east-west or north-south mainline railroad east of the Mississippi could operate without passing through this territory. Markham did not perform work in the entire eastern seaboard and in fact, performed work only in a limited area of some of the states listed in the restrictive covenant.

A restriction that covers a geographic area in which the employee never had contact with customers is overbroad and unreasonable. This covenant is unreasonably broad because it covers a region and areas of states where the plaintiff never worked.

Scope of Activity

The restrictive covenant in this case prevented Markham from performing work for any competitors of Fawcett both in the provision of emergency remediation services and "in any other capacity whatsoever."

Under our cases, a former employer may validly restrict an employee from performing services for a competitor that are identical to those performed for the

former employer. Our courts have approved as reasonable restrictions that specifically state those activities related to the employer's business in which the employee was trained by the employer or worked for the employer. Such a restriction protects the employer's interests from competition in that area of service.

By contrast, a restrictive covenant that prohibits work for a competitor “in any capacity” does not protect a legitimate interest of the employer and imposes a greater limitation on the employee than is necessary. In this case, the contract prohibits Markham from working for a competitor in any capacity, including activities that have nothing to do with the services that he performed for Fawcett. This provision is unreasonably broad.

Duration of Restriction

The restrictive covenants in this case restricted Markham from competitive activity for a period of three years after the termination of his employment with Fawcett.

Our cases do not state a specific time period past which a given time restriction is per se unreasonable. Instead, the cases require employers who seek to uphold a time restriction to demonstrate how the restriction is necessary to the protection of the employer during the employee’s transition to work for a competitor. An employer must prove specific facts and circumstances that support a finding of necessity. Absent such proof, our courts have invalidated time periods as short as one year or less.

The trial court in this case found that Fawcett offered no proof of the relationship between the time restriction and Fawcett’s need for protection from competition. Moreover, we note that in none of our cases have we or our sister courts approved restrictions of longer than two years. We see no error in the trial court’s conclusion that the three-year restriction in this case was unreasonable.

“Blue Pencilling”

Fawcett argues that the trial court erred in failing to “blue pencil” this covenant by modifying it to a more reasonable form, consistent with the situation and intentions of the parties. Fawcett argues that the court should have modified the provisions as follows: to restrict them to territories in which Markham had worked; to cover only the services that Markham had provided; and to be limited to the maximum time period approved by our prior cases (two years).

We disagree. The facts indicate that the covenants in this case bore no relationship to Fawcett’s need for protection from competitive practices after Markham left its employ. This covenant not to compete is invalid and should not be revised. In such a situation, a trial court does not err in refusing to “blue pencil” the contract.

For all of the foregoing reasons, we affirm.